

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

August 2, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 25, 2006

Case Number: TSO-0351

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX ("the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, access authorization (security clearance) should be granted to the Individual. For the reasons detailed below, it is my decision that the doubts concerning the Individual's eligibility for a clearance have been resolved and access authorization should be restored.

I. APPLICABLE REGULATIONS

The regulations governing an individual's eligibility for access authorization (also "security clearance") are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(b)(3). The burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, i.e., that access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." *Id.* § 710.27(a).

II. BACKGROUND

The Notification letter

This proceeding began on December 8, 2005, when a DOE Local Security Office (LSO) notified the Individual that it possessed derogatory information which created a substantial doubt as to his continued eligibility for an access authorization under 10 C.F.R. § 710.8 (j)¹. *Attachment, Notification Letter (Notification Letter) dated December 8, 2005*. The letter advised the Individual of his right to request a hearing in the matter, which he did by letter dated December 27, 2005, and the LSO forwarded the Individual's request to the Office of Hearings and Appeals (OHA), which we received on January 25, 2006. I was appointed to serve as Hearing Officer.

The Individual is employed by a contractor at a DOE facility in a position that requires him to have a security clearance. According to the Notification Letter, the LSO possesses information which indicates the Individual is or has been

. . . a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist as alcohol dependent or as suffering from alcohol abuse. This behavior is subject to the provisions of Title 10, Code of Federal Regulations (10 CFR), Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material," Section 710.8, paragraph (j).

Notification Letter attachment.

As support, the attachment to the Notification Letter enumerates three incidents involving alcohol and the results of a psychiatric examination performed in September, 2005. Two of the incidents were alcohol-related arrests, the first in 1967 for "Violation of Liquor"² and the second in 1991 for Driving while Intoxicated (DWI). The third incident occurred in May 2005, when alcohol was detected on the Individual's breath at his job during working hours. A blood alcohol test was administered and he tested 0.03.

The results of the psychiatric examination are:

On September 19, 2005 . . . a DOE-consultant psychiatrist, evaluated [the Individual and concluded that he] is a user of alcohol habitually to excess and meets the *Diagnostic and Statistical Manual of the American*

¹ (j) Been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

² The Individual had an open container of alcoholic beverage when stopped by the police for another infraction.

Psychiatric Association, IVth Edition Text Revision (DSM-IV TR) criteria for Alcohol Related Disorder, Not Otherwise Specified.

Notification Letter attachment.

The Psychiatric Report

After the May incident, the Individual was referred for a Personnel Security Interview (PSI). Based upon the substance of the PSI, an evaluation by a DOE-sponsored psychiatrist was recommended. That interview took place on September 19, 2005.

In the referral for a psychiatric evaluation, the LSO asked the consultant-psychiatrist to address four questions:

1. Has (the Individual) been, or is he a user of alcohol habitually to excess or is he alcohol dependent or suffering from alcohol abuse?
2. If so, is there adequate evidence of rehabilitation or reformation?
3. If not rehabilitated, what length of time and type of treatment would be necessary for adequate evidence of rehabilitation or reformation?
4. Does (the Individual) have an illness or mental condition that causes, or may cause, a significant defect in judgment or reliability?

September 22, 2005 Psychiatric Report at 1-2 (the September Report).

In his September Report, the psychiatrist diagnoses the Individual as a user of alcohol habitually to excess and suffering from Alcohol Use Disorder, Not Otherwise Specified. He does not find that the Individual was Alcohol Dependent or suffering from Alcohol Abuse. *September Report at 10-11.* The doctor also finds that there is "not adequate evidence of rehabilitation or reformation", because at the time of the examination, the Individual "continues to drink . . . (and) has never entered into a voluntary treatment program for Alcohol abuse." *September Report at 11.*

For rehabilitation, the DOE-sponsored psychiatrist stated:

(O)utpatient treatment of moderate intensity would be adequate. By moderate intensity I mean a treatment regimen such as Alcoholics Anonymous at least weekly, or individual substance abuse counseling. His program should include maintenance of sobriety (abstinence from alcohol). Duration of such treatment should be for at least six months to provide adequate evidence of rehabilitation and reformation.

September Report at 11.

In response to the fourth question posed by DOE, the psychiatrist *did not* diagnosis the Individual as suffering from any mental illness. *September Report at 11.*

In response to the December 8, 2005, Notification Letter, on December 27, 2005, the Individual requested a hearing and responded to the Notification. In his letter, the Individual does not contest the allegations of the Notification Letter. In his defense, however, he cites his very lengthy, unblemished record of employment, his awareness of the importance of security, and stresses that he has never had any other security infraction. The Individual also states that he has stopped drinking alcohol, and has gone to both weekly counseling at his workplace and to weekly Alcoholics Anonymous meetings." *Response to Notification Letter.* He has also been tested weekly for alcohol at his workplace with no positive showings.

IV. THE HEARING

Attending the hearing were the DOE-sponsored psychiatrist, DOE counsel and the Individual. The Individual called seven witnesses in this order: His group leader/indirect supervisor of two years standing, the long-time drug and alcohol counselor for the Individual's employer, the Individual's temporary AA sponsor, his adult daughter and his spouse. In addition, the Individual called as witnesses several long-time colleagues and friends.

In each instance, DOE counsel very effectively qualified and questioned the Individual's witnesses. The Individual posed questions as he thought necessary. The testimony of these witnesses covered the entirety of the Individual's working and non-working hours, his lengthy career, and his efforts towards recovery and rehabilitation. Several witnesses have known the Individual for decades. All spoke with great authority and warmth. Uniformly, each testified to the individual's outstanding personal qualities: honesty, integrity, diligence, reliability, hard work and achievement. Each, to the extent of their personal knowledge, also testified that they had not seen the Individual drink alcohol since at least November, 2005.

On his own behalf, the Individual testified that after the psychiatric evaluation he sought help from the employee assistance unit at his workplace. The person in charge of the facility – also a witness for the Individual – advised him to stop drinking alcohol, among other measures. *Tr. at 50.* Since that time in October, 2005, the Individual did stop drinking, attended AA meetings weekly, has been tested every week for alcohol, and has met for weekly counseling with the person in charge of the employee assistance program. The Individual testified that he intends to continue with AA and abstain from alcohol. *Tr. at 10, 136.*

The employee assistance supervisor confirmed the substance of the Individual's testimony. He also stated that he felt the employer had "dropped the ball" when the Individual first came in on May 20, 2005, after alcohol was detected on the Individual's breath. *Tr. at 36-8*. He thought that the incident should have triggered a fitness for duty examination for the Individual in May and, based on his experience counseling the Individual in and after October, 2005, stated that "I really believe that . . . we would be (now, the date of the hearing) approaching a year of sobriety. *Tr. at 37-39*. As for the future, this witness stated "I've never been good at predicting the future, but (the Individual) certainly has the tools, the motivation, and the right attitude to retain his sobriety long term. I feel very confident with that." *Tr. at 53*.

One matter arose which had not previously entered the record. A witness and long-time friend and colleague of the Individual reluctantly, but voluntarily, testified that the Individual told the witness that he – the Individual -- had taken a very small amount of alcohol during a football tailgate party in November, 2005.

The witness: There is somebody who has these (football stadium) seats and a barbecue, and he gives (the Individual) free barbecue for his wife and family. . . And the guy makes his own little bit of Schnapps, and he asked Larry to taste it, and he gave Larry a little taste – I don't know – and Larry felt that he should taste it because the guy has been giving him free barbecue to his whole family and stuff and he wanted him to taste it, and it's true that I didn't like it when (the Individual) told me that, because him telling me that meant I would have to tell you (the Hearing Officer), but he says he took a little taste so he could say to the guy, "That's very nice." . . . And I wished he hadn't told me. Maybe he does now, too.

The Individual: No.

The Witness: Okay. But I also understood that there are some times in life when you feel obligated to people, and this guy was proud of his homemade Schnapps, or whatever the stuff was, and he wanted (the Individual) to taste it.

Tr. at 108-9

Before testifying, the psychiatrist was present for the entire hearing, and was able to observe the testimony of the Individual and all of the witnesses. Then, the doctor testified to the substance of his interview, evaluation, and report concerning the Individual. In particular, the psychiatrist testified that he had

diagnosed the individual only as an alcohol user habitually to excess, not otherwise specified. *Tr. at 155-56*. He also testified that he found the Individual to be credible (not duplicitous), that he had developed no tolerance for alcohol or any withdrawal symptoms. Nor did he have any recurrent legal problems due to alcohol consumption. *Tr. at 154*. Regarding the two problems in 1967 and 1991 cited in the Notification Letter attachments, the psychiatrist dismissed those as not "recurrent." *Id.*

Concerning the recommendations in his report to DOE, the psychiatrist testified that:
(O)ne year . . . is the usual time frame I'll give to alcohol abuse.

I did the unusual thing with (the Individual) of shortening it even further to say – or six months is what I recommended for him, that there would be six months required for him to be sober to demonstrate adequate evidence of rehabilitation.

That's probably about the shortest I've ever listed down when I'm asked to answer that question of how long – how much time do you need before you can kind of vouch for the person that they are rehabilitated or reformed, and I put that because his diagnosis – his problem with alcohol was much less than what I usually see.

Tr. at 163.

The DOE-sponsored psychiatrist went on to testify that, in sum, the path of treatment taken by the Individual was acceptable. *Tr. at 163-4*. When asked by DOE counsel whether the Individual's period of sobriety as of the date of the hearing was sufficient, the doctor observed that the Individual seemed to have had only about five and one-half months of sobriety, and that he – the psychiatrist -- would "stick with (the six months) number that I've given." *Tr. at 164-6*.

IV. STANDARD OF REVIEW

The decision whether to grant access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; how recently and often the conduct occurred; the age and maturity of the individual at the time of the conduct;

whether participation was voluntary; rehabilitation, reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. 10 C.F.R. § 710.7(c).

V. OPINION

My decision is that the Individual's access authorization be restored. The evidence of his rehabilitation and reformation is overwhelming. All of the witnesses were candid and convincing, as was the Individual. He has done everything that might have been asked of him by the DOE-sponsored psychiatrist, and he voluntarily took that path before the doctor's report was available to him. The two medical professionals involved in this proceeding – the psychiatrist and the person who runs the employee assistance program and counsels the Individual – are both convinced that the prognosis for the Individual is positive.

The sole factor weighing against an affirmative determination is that, at the time the hearing took place, only two weeks remained before the Individual could have fulfilled the full, prescribed period of sobriety called for by the DOE psychiatrist. It is clear to me that given 14 more days, the DOE-sponsored psychiatrist would have deemed the Individual reformed and rehabilitated. That short period, in my view, should not mandate a negative result in this case.³

Finally, as in other proceedings, I left the record open after the hearing to allow for the submission of additional, pertinent material after the hearing. In this case, several witnesses were unavailable for the hearing, just as were the results of alcohol tests for the Individual. Subsequently, alcohol test results were provided for the record showing that several weeks after the hearing -- and after the end of the six month period set out by the DOE-sponsored psychiatrist -- the Individual continued to refrain from drinking alcohol. The specific materials are official Alcohol Testing Form(s) used by the LSO that show negative alcohol test results for the Individual. *"Alcohol Testing Form (Non-DOT)" dated May 23, 2006.*

VI. CONCLUSION

The Individual has resolved the Criteria J concerns set forth in the Notification Letter. Therefore, I conclude that restoring the Individual's access authorization

³ A negative decision in this case would encourage delay in other proceedings. In addition, hearing schedules are governed by any number of factors that are *completely* unrelated to the merits of a case, e.g., the workload of the hearing officer, the availability of counsel for the Individual and/or the LSO, the availability of experts and other witnesses, transportation, weather, etc.

"would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, the Individual's access authorization should be restored.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Richard T. Tedrow
Hearing Officer
Office of Hearings and Appeals

Date: August 2, 2006